Bugging Decision Leaves a Question: Is It Retroactive?

By John P. MacKenzie
Washington Post Staff Writer

News Analysis

One of the most intriguing questions left open by Monday's electronic bugging decision, Katz v. U.S., is whether the Supreme Court will make it retroactive.

As far as future cases are concerned, the Court has made it clear that electronic intrusions upon privacy are "searches" in a constitutional sense and require most of the safeguards that go with conventional searches.

But whether other defendants now in the courts should benefit along with Los Angeles gambler Charles Katz is fraught with ironies and problems. The Court will be asked to grapple with them very soon.

Katz's case was the vehicle for the Court to overrule, specifically and flatly, two old decisions that held microphone eavesdropping beyond the reach of the Fourth Amendment's ban on unreasonable searches and seizures if the bugging was accomplished without a physical trespass into the target area.

Now the Court is saying that police and Federal agents must get a judicial warrant akin to a conventional search warrant before engaging in the practice.

But what of the cases already in the legal pipeline in which law enforcement officers, relying on the old doctrine, made no effort to justify the bugging in advance before a judicial officer? Katz, who was fined $300 for telephoning basketball odds long-distance, was small potatoes compared to some of the defendants in these cases.

Already on the Court's list of petitions is the case of a smuggling ring caught in the largest narcotics seizure in Treasury Department annals—209 pounds of pure heroin valued as high as $100 million depending on how it was marketed—with the indispensable aid of a bug planted in New York's Waldorf-Astoria Hotel.

Convicted in the drug conspiracy were Frank (Frankie Dio) Dioguardi, brother of mobster Johnny Dio; his brother-in-law, Anthony Sutera; retired Army Maj. Samuel Desist, and two Frenchmen, Jacques Dourheret and Jean Nebbia. Sentences ranged between 10 years for Sutera to 20 years for the Frenchmen.

In contrast to Katz, who the Supreme Court said was entitled to privacy for the dime he deposited in a public telephone booth, the conspirators went first-class, but Nebbia's room at the Waldorf proved to have Treasury agents next door. They planted a microphone against the bottom of a common, locked door and heard through the tiny air space of the smugglers' plans to link up with their American contacts.

On Oct. 13 the Second U.S. Circuit Court of Appeals in New York, which was not inclined to rush ahead of the Supreme Court on the issue, adhered to the old trespass rule and held that tape recordings of the Waldorf conversations had been properly used as evidence.

The defendants filed their petition last week contending that theirs was an example of why the old trepass doctrine should be overturned. Not by coincidence, the Government's brief in the Katz case cited the pending drug appeal as an example of why, even if the old doctrine was repudiated, the ruling should not apply to old cases.

Supreme Court Justices have grappled with the "retroactivity problem" several times in this activist decade and have shown increasing reluctance to allow old cases to be reopened on the basis of newly declared constitutional law.

Most recently last June, the Court limited to future police lineups its new ruling that suspects were entitled to counsel when they are exhibited before complaining witnesses for identification.

The Court has laid increasing stress on the fact that individuals like Katz are "chance beneficiaries" of changing legal concepts, that police may have relied on the old law in good faith and that there was danger of a lot of felons being turned loose.